RELIGION AND THE LAW IN THE CLINTON ERA: AN ANTI-MADISONIAN LEGACY

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I
INTRODUCTION

President William Jefferson Clinton's two terms in office have been awash in religious rhetoric and in actions taken to further religious exercise, both domestically and abroad. The free exercise of religion, which President Clinton calls "perhaps the most precious of all American liberties,"[1] has been a high priority on the Administration's agenda.[2] The Administration has worked diligently through all three federal branches in pursuit of the issue, because, in the President's words, one "can never be too vigilant in this work."[3]

Religious observance also has been woven into the ordinary operation of the presidency under President Clinton, including public requests for forgiveness of sins.[4] Cabinet meetings are opened with prayer,[5] he regularly consults Protestant ministers on a seemingly wide variety of issues,[6] and his travel itineraries often include meetings with religious leaders. The President regularly attends prayer breakfasts, at which members of Congress and members of the Supreme Court are not uncommon participants, and where he frequently makes remarks on religious themes and Biblical scripture. Prayer breakfasts are not a new element of his political life. At the first national prayer breakfast following his presidential inauguration, he proudly declared that he helped to initiate the

1. Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 WEEKLY COMP. PRES. DOC. 2377 (Nov. 16, 1993) [hereinafter RFRA Remarks].

2. *See The International Religious Freedom Act of 1998: Hearings on S. 1868 Before the Sen. Comm. On Foreign Relations,* FDCH Congressional Testimony (May 12, 1998) [hereinafter Testimony of John Shattuck] (testimony of John Shattuck, Asst. Sec. For Democracy, Human Rights and Labor) (commenting that "the promotion of religious freedom, both at home and abroad, remains a high priority for this Administration"); Final Report of the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States (May 17, 1999) <http://www.state.gov/www/global/human_rights/990517_report/table.html>.

3. RFRA Remarks, *supra* note 1.

4. *See* Marc Lacey, *Clinton Tells of an "Unmerited Forgiveness*," N.Y. TIMES, Sept. 29, 1999, at A1.

5. *See* Remarks at a Prayer Breakfast in Houston, 28 WEEKLY COMP. PRES. DOC. 1460 (Aug. 20, 1992) [hereinafter Houston Remarks].

6. Newsweek has dubbed President Clinton the "most pastorized" President in history. *See* Kenneth L. Woodward, *From the Glass House to the White House,* NEWSWEEK, Mar. 3, 1997, at 62; *see also Peggy Wehmeyer, 20/20: The President's Pastors: The Men Helping to Repair the President's Soul* (ABC television broadcast, Sept. 23, 1998).

first Arkansas governor's prayer breakfast, an event that became a "very important part of [his] life there."[7]

From the perspective of the First Amendment, however, which protects free exercise but also forbids laws effecting an establishment of religion, the Clinton Administration is quite lopsided. While President Clinton is passionate about religious free exercise, he has been markedly unconcerned about the proscription of the establishment of religion. Thus, his fervor for free exercise has not been matched by any sincere effort to enforce the Establishment Clause.

Nor does the Administration have a particularly keen sense of history when it comes to Religion Clause issues. More than once, President Clinton has adverted to the privileged status of the First Amendment, arguing that the framers prized religious liberty most of all because it appears in the First Amendment.[8] The First Amendment, though, was first only because other amendments preceding it had not yet been adopted by Congress.[9]

More troubling is President Clinton's deaf ear to Framer James Madison's warnings about the dangers of organized religion in the political sphere.[10] Prompted by his understanding of Stephen Carter's book, *The Culture of Disbelief*,[11] President Clinton routinely whitewashes religion, treating it as an undifferentiated force for good.[12] Moreover, he actively encourages religious lobbyists to join together to increase their power in the political process and to raise their voices in the public square, including the international public square.

James Madison intended for the First Amendment to be a double-edged sword. On the one hand, religions should be accorded free exercise. On the other hand, the government may not pass a law respecting an establishment of religion.[13] While Madison certainly believed in a kind of religious liberty, and that religious entities should make their views known, two other essential principles shaped his understanding of religious liberty.

First, Madison believed that all men and all factions are capable of acting in ways that are at odds with the public good.[14] In his words, "[t]he truth was that

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7. Remarks at the National Prayer Breakfast, 29 WEEKLY COMP. PRES. DOC. 136 (Feb. 4, 1993).

8. *See*, *e.g.*, Proclamation No. 7063, 63 Fed. Reg. 3243 (1998); Remarks Following Discussions with Religious Leaders, WEEKLY COMP. PRES. DOC. 1151 (June 22, 1998); President's Remarks on Religious Liberties, 1995 WL 410673, at *1 (White House) (July 12, 1995); RFRA Remarks, *supra* note 1.

9. *See* RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 1.03[2], at 1-17 n.28 (1994).

10. *See* Ralph L. Ketcham, *James Madison and Religion—A New Hypothesis, in* JAMES MADISON ON RELIGIOUS LIBERTY 175, 190-91 (Robert S. Alley ed., 1985).

11. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 213 (1993).

12. In his article for this symposium, Randy Lee makes the same error. Both President Clinton and Lee are caught within a Christo-centric worldview that presumes, without stating, that dangerous or fringe religions and cults are not really religious. *See generally* Randy Lee, *When a King Speaks of God, When God Speaks to a King: Faith, Politics, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391 (Winter/Spring 2000).

13. *See* U.S. CONST. amend. I, cl. 1.

14. *See* JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 428 (Adrienne Koch ed., 1966) (statement of Gouverneur Morris).

all men having power ought to be distrusted to a certain degree."[15] On this score, religious individuals and groups are no different than any other group in society; they also deserve distrust.[16] Moreover, religion particularly cannot be trusted because it "may become a motive to persecution or oppression."[17] At the Constitutional Convention, Madison did not express concerns about protecting religious liberty, but rather voiced worries about the power of organized religion to enter and corrupt the political process.[18] He fundamentally understood that religious entities are capable of "impish" behavior that disserves the public good, and denounced religion when it did so.[19] Indeed, his famous *Memorial and Remonstrance* was built around his judgment that religious assessments were a "dangerous abuse of power" by church and state.[20]

Second, Madison thought that factions, or smaller concentrations of power, are safer than large consortiums of power.[21] He favored a regime in which power is divided and dispersed. Thus, the large geographical distribution of society in the United States was a positive good because it naturally divided and dispersed factions and interests.[22] This persistent political theme permeates his writings and applies to a wide variety of social entities, including religious sects.[23] Framer Rufus King echoed this principle, pointing out that when religious entities combine, they "will have their influence on government."[24]

Madison did not favor a multiplicity of religious sects for the purpose of encouraging ecumenism. To the contrary, he believed that a number of individual sects is vastly preferable to a "majority united by a common interest or passion," which places the "rights of the minority in danger."[25] The consolidation of sects weakens their mutual checking power. On this score, more liberty is possible when sects proliferate, and preserve their distinctive identities and agendas in the public square. Madison's fear of religious entities with political power and his fear of the consolidation of that power persisted through his presidency, after which he stated that the "danger of silent accumulations & en-

15. *Id*. at 272; s*ee also id*. at 288 (statement of Roger Sherman) ("They will if they acquire power, like all men, abuse it.").

16. *See id.* at 76 (including under "different Sects, Factions, & interests," the "rich & poor, debtors & creditors, the landed, the manufacturing, the commercial interests, the inhabitants of this district or that district, [and] the disciples of this religious Sect or that religious Sect").

17. *Id*.; *see also* ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 25 (1990) (referring to Madison's distrust of "institutional religion"); Ketcham, *supra* note 10, at 189.

18. *See* MADISON, *supra* note 14, at 76.

19. Letter from James Madison to William Bradford (Jan. 24, 1774), *in* 1 THE PAPERS OF JAMES MADISON 106 (William T. Hutchinson & William M.E. Rachal eds., 1962) (referring to "pride, ignorance and knavery" of priesthood of Anglican Church in Virginia and "Vice and Wickedness" of the laity).

20. James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 301-03 (Robert A. Rutland & William M.E. Rachal eds., 1973).

21. *See* MADISON, *supra* note 14, at 428.

22. *See* THE FEDERALIST NO. 10 (James Madison).

23. *See id.* NO. 51.

24. ROBERT ERNST, RUFUS KING: AMERICAN FEDERALIST 57 (1968).

25. MADISON, *supra* note 14, at 76.

croachments by Ecclesiastical Bodies have not sufficiently engaged attention in the U.S."[26]

Two hundred years later, in the Clinton era, Madison's warnings have been forgotten. None of these hard-nosed, pragmatic warnings from the drafter of the First Amendment have tempered President Clinton's rhetoric or actions. Instead, he regularly invites religious individuals and institutions to come together not only to advise him, but also to lead the country in a large number of public policy arenas.

With his pro-free exercise rhetoric and initiatives, President Clinton has made it possible for religion to continue to gain ground in the political arena even after he leaves office. He will have set the tone for the 2000 presidential race, left a substantial legacy of religious legislation, and left in place new administration policies focused on free exercise, particularly in the State Department.

In 2000, presidential candidates have become very open about discussing religion and courting religious believers. The press often has assumed that they are trying to distance themselves from President Clinton and his scandals by cloaking themselves in religion.[27] The record, however, reveals that they are following directly in President Clinton's footsteps. The message they seem to have learned from him is that a multitude of personal failures can be prevented from becoming political failures if religion—and especially Christianity—plays a large role in the politician's rhetoric. It is almost as though talk of religion is an insurance policy against past or future failures.

This article first examines President Clinton's rhetoric, and then his Administration's actions to promote religious free exercise. My purpose is two-fold. First, I intend to document the role the Clinton Administration has played with respect to religion for historical purposes. Second, I intend to show that the Administration has integrated religious entities into administrative agenda-setting, which is consciously intended to serve religious ends. Many of these initiatives either ignore the Establishment Clause or violate it. From a constitutional perspective, they are deeply troubling.

During the course of President Clinton's Administration, ecumenical religious organizations, especially the Coalition for the Free Exercise of Religion, have been greeted with open arms.[28] As discussed in detail *infra*, a panoply of legislative and executive measures, some quite extreme and others more moderate, have been implemented to further religious interests. Free exercise issues also have found their way to the top of the Administration's foreign policy

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26. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 121 (1994); *see also* Madison, *supra* note 20.

27. *See* Laurie Goodstein, *White House Seekers Wear Faith on Sleeve and Stump*, N.Y. TIMES, Aug. 31, 1999, at A1; Ann McFeatters, *Religion and Presidential Politics*, BUCKS COUNTY COURIER TIMES, Aug. 27, 1999, at 21A.

28. *See*, *e.g., infra* notes 69-85 and accompanying text.

agenda.[29] This is a decided shift in American foreign policy objectives, the effect of which it is much too early to assess.

The final judgment regarding the impact of this Administration on the balance of power between church and state—and therefore the public good—cannot be reached until we know whether its pro-religion policies last beyond President Clinton's two terms as President. One of his central goals, to bring together divergent faiths into an ecumenical social movement, has faltered. The Coalition for the Free Exercise of Religion, which Clinton has fostered and given broad latitude in agenda-setting, has disintegrated to some degree.[30] It did not fall apart, however, before suggesting and backing a number of free exercise initiatives. The President praised and embraced many of its proposals, and some have become law. Thus, even if the Coalition's existence was only momentary, its influence will be felt for years to come.

II

THE RHETORIC

By his own admissions, President Clinton seems to have taken a great deal of his Administration's agenda regarding religion from his reading of Professor Stephen Carter's book, *The Culture of Disbelief*.[31] The book carries a simple message for Clinton: a mandate to include more religious individuals and entities at every level of policymaking. He also reads the book as suggesting that he, as President, bring more religious speech into the presidential vernacular. His reaction to the book, revealed in his words and actions, has earned him the right to be dubbed "the most religiously activist President in history."

A. *The Culture of Disbelief*

A president's tenure is shaped by his interpretation of the *Zeitgeist*.[32] President Clinton has treated Stephen Carter's *The Culture of Disbelief*,[33] the publication of which followed his inauguration, as the definitive statement of the contemporary relationship between religion and the law in the United States. Judging from his own comments, the President was profoundly affected by the book. At various times from 1993 to 1995, he stated that he was "quite moved" by the book,[34] spoke of its "profound impact" on him,[35] and described it as a

29. *See*, *e.g., infra* notes 130-48 and accompanying text.

30. *See* Daniel Kurtzman, *Jewish groups drop out of coalition for Religious Liberty Protection Act* (Sept. 21, 1999) <http://jta.virtualjerusalem.com/index.exe?9909219>; *infra* text accompanying notes 70-85 (discussing the Coalition and its influence in Congress and the Clinton Administration).

31. *Supra* note 11.

32. *Cf.* Marci A. Hamilton, *Representation and Nondelegation: Back to the Basics*, 20 CARDOZO L. REV. 807, 816 (1999) ("While the legislature provided many outlets for the many factions in the society, the executive was to be the representative of the Zeitgeist, the spirit of the times. A small number, presumably, would not generate cabals and intrigues but could, rather, exercise the sort of decisive leadership missing under the Articles of Confederation.").

33. *Supra* note 11.

34. RFRA Remarks, *supra* note 1.

book that he "promoted almost shamelessly."[36] Indeed, Yale University commissioned a portrait of the President in which he was holding *The Culture of Disbelief* in his hand. The President commented that he was "deeply honored to be holding that book [in the portrait]. I loved it."[37] He credited the book with motivating him to push his Administration to "live up to the spirit as well as the letter" of religious liberty legislation, and to disseminate guidelines for religious practice in public schools.[38]

The reason President Clinton was so moved by the book reveals a great deal about him and about his religious agenda and legacy. In a line that would describe a great deal of his Administration's policy regarding religion, he stated that he was persuaded by Carter's argument that "we need not seek freedom from religion."[39] Rather, we must "make room for [religion] in the public square."[40] Carter, on Clinton's reading,

> makes a compelling case that today Americans of all political persuasions and all regions have created a climate in this country in which some people . . . are embarrassed to say that they advocate a course of action simply because they believe it is the right thing to do, because it is dictated by their faith, by what they discern to be, with their best efforts, the will of God.[41]

For President Clinton, then, *The Culture of Disbelief* is a work that reveals a systemic social problem not unlike invidious, race-based discrimination. Individuals are allegedly being excluded from social discourse and influence because of a particular characteristic: religion. The prescription is that Americans need to find the unity of their "inner values," which Clinton thinks of in religious terms.[42] Thus, his answer to the trivialization of religion is a two-step plan for integration of religion into the public square. First, he implores religions to work together. Second, he advocates bringing them closer to the government.

President Clinton thus urges political ecumenism: the joining hands of different faiths for the purpose of moving public policy. These themes of unity and ecumenism have become the rallying points of his religious agenda.

B. The United States Is a Religious Country

President Clinton's captivation by *The Culture of Disbelief* can be explained in part by examining his vision of the American polity. The theme of a single, unified America runs throughout his tenure as President. This is "one Amer-

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35. Remarks at the National Prayer Breakfast, 30 WEEKLY COMP. PRES. DOC. 194 (Feb. 3, 1994).

36. Remarks at Yale University in New Haven, Connecticut, 29 WEEKLY COMP. PRES. DOC. 2047 (Oct. 9, 1993).

37. *Id.*

38. Remarks at a Breakfast With Religious Leaders, 31 WEEKLY COMP. PRES. DOC. 1521 (Sept. 8, 1995) [hereinafter Religious Leaders Remarks].

39. Remark at the National Prayer Breakfast, *supra* note 35.

40. Religious Leaders Remarks, supra note 38.

41. RFRA Remarks, *supra* note 1.

42. Remarks at Yale University, *supra* note 36.

ica," he says,[43] and religion is the unifying force that can engender such unity, because this is the "most religious Nation on Earth."[44] "Our nation was founded by people of deep religious beliefs[, and] Americans are still a profoundly religious people, and our faith continues to sustain us."[45] This theme urges citizens to work together to rebuild a single, faithful American community to further "our journey to become truly one America."[46]

Clinton consistently blurs the lines between church, state, and society. He frequently assumes that all Americans are faithful, saying that "[r]eligious freedom is at the heart of what it means to be an American,"[47] and that "[w]e are a people of faith."[48] Among the principles that "inspire America" is that "so many people [are] brought together by a shared spirit, the simple joy of praying to God."[49] Religious entities are not distinct organizations, pursuing ends dictated by particular religious principles so much as they are

> centers of community service and community life. They preserve and promote the values and religious traditions that have infused our efforts to build a civil society based on mutual respect, compassion, and generosity. They provide our children with the moral compass to make wise choices.[50]

In President Clinton's rhetoric, the identification of faith with being American is so strong that "one cannot be President of our great country without a belief in God, without the truth that comes on one's knees."[51] Indeed, he has gone so far as to say that religion is a *sine qua non* for democracy.[52] He has extended this reasoning, saying that students who do not comprehend the "basic values behind the great religions" are unlikely to become the "kind of citizens they ought to be."[53]

President Clinton's assertion that religion is a crucial underpinning of the United States is based on an assumption that religion is unequivocally good. Thus, he has extolled the virtues of religion, while remaining mute about unacceptable religious practices, such as permitting children to die in faith-healing

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43. Remarks Announcing Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, 33 WEEKLY COMP. PRES. DOC. 1245 (Aug. 14, 1997) [hereinafter Guidelines Remarks].

44. Houston Remarks, *supra* note 5. The President's claim that this is a religious country is a variation on the 19th century rhetoric that the United States is a Christian country. *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1100-35 (1995).

45. The President's Radio Address, 34 WEEKLY COMP. PRES. DOC. 1004 (May 30, 1998).

46. Guidelines Remarks, *supra* note 43; *see also* Remarks at the National Prayer Breakfast, 28 WEEKLY COMP. PRES. DOC. 178 (Jan. 30, 1992) [hereinafter Prayer Breakfast Remarks] ("We are truly one Nation under God.").

47. Guidelines Remarks, *supra* note 43.

48. RFRA Remarks, *supra* note 1; *see also* Proclamation 7162 (Religious Freedom Day, 1999), 64 Fed. Reg. 2989 (1999) ("Americans are a deeply religious people.").

49. Prayer Breakfast Remarks, *supra* note 46.

50. Proclamation 7162, *supra* note 48.

51. Houston Remarks, *supra* note 5. He says again, "You cannot be President without believing in God." *Id.*

52. *See* RFRA Remarks, *supra* note 1.

53. Religious Leaders Remarks, *supra* note 38.

homes. While the Administration argued in favor of enforcing child labor laws in a case involving a Mennonite defense to such laws, the President himself has limited his criticism of religious practices to female genital mutilation and hate crimes, which are often motivated by religious, if socially unacceptable, precepts.[54] Even then, his criticism of such actions has not reflected the religious nature of the actions he criticized. When religious actions have violated his moral compass, he has dropped reference to the religious quality of the actions and instead focused on the social evil.[55]

C. Ecumenism in Politics: the Anti-Madisonian Project

President Clinton interprets Carter's thesis in *The Culture of Disbelief* to be that religious entities have been treated badly in the political arena, and therefore he should open the door to them. In his 1995 State of the Union Address, he challenged citizens to create a "New Covenant" by being "more responsible to people of faith and to religious leaders."[56] He went on to say that religious entities were necessary to solve problems with teen pregnancy and excessive violence. Moreover, he asserted that religious organizations should band together as they enter that arena. He has striven to "galvanize the energies of people of faith to work together on a common agenda,"[57] and remarks that "whatever has been done which is good has been done by us together."[58] Thus, he actively encourages and rewards ecumenical effort in the political process and in advising the Administration. This is the sort of accumulated power that worried Madison.[59]

President Clinton has fostered political ecumenism for the purpose of furthering his pro-free exercise agenda. Religious leaders have been charged with finding as many ways as possible to increase and further religious free exercise. In 1998, for example, he thanked religious leaders for "helping [him] strike blows for religious liberty," thanked the many "in the community of faith who have worked with the [g]overnment in partnership," and thanked "those . . . who have been responsible for working with me . . . to bring communities of faith into the circle of national service."[60] The Clinton Administration also created the Secretary of State's Advisory Committee on Religious Freedom Abroad, which was composed solely of religious leaders and lobbyists, for the purpose of fostering "effective partnerships between the U.S. government and a

54. *See* Cassel v. Mennonite Conference, Nos. 93-1436, 93-1464, 1993 U.S. App. LEXIS 35505, at *1 (3d Cir. Dec. 6, 1993) (unpublished opinion). For discussion of the female genital mutilation bill, see *infra* notes 164-66 and accompanying text.

55. *See infra* notes 164, 201 and accompanying text (discussing President Clinton's position on hate crimes and legislation on female genital mutilation legislation).

56. Interview With Religious Journalists, 31 WEEKLY COMP. PRES. DOC. 173 (Feb. 2, 1995) (referring to the State of the Union Address); *see* Address Before a Joint Session of the Congress on the State of the Union, 31 WEEKLY COMP. PRES. DOC. 96 (Jan. 24, 1995).

57. *Id.*

58. Remarks at the Ecumenical Prayer Breakfast, 33 WEEKLY COMP PRES. DOC. 9 (Jan. 6, 1997).

59. *See supra* notes 14-26 and accompanying text.

60. Remarks at the National Prayer Breakfast, 34 WEEKLY COMP. PRES. DOC. 201 (Feb. 5, 1998).

broad range of religious communities, academic institutions, and advocacy groups to advance religious freedom."[61] It was a mechanism for bringing the government closer to religious entities, which was described as "a venue for religious organizations and non-governmental organizations interested in religious liberty to engage with the U.S. Government on this issue."[62] It saw an "increasingly significant role" for religious entities in "resolving conflicts, reconciling antagonistic groups, fostering the peaceful evolution of civil society, and promoting human rights," and praised the "emergence of inter-religious networks on a regional, national, and global basis."[63] This distinguished, though religio-centric committee, viewed religious organizations as entities that do and should shape world policy.[64]

On the obvious point that religious entities have been embroiled in religious crusades and conflicts for centuries, the Committee took a tack often taken by the President: It whitewashes religion. On the one hand, religion is necessary for world order and peace. On the other hand, in a truly remarkable statement, the Committee absolved religion of blame for such discord, declaring that when religion gets mixed into wars or political discord, "religion itself is rarely a political actor in conflict situations. Although many political and religious leaders have mobilized beliefs for political ends, aims, and means, the religions themselves cannot be faulted for the conflicts that have resulted."[65] This abstract portrait of religion is representative of and consistent with President Clinton's frequent references to the spirituality of the American people without reference to the white supremacist or other hate groups that operate on plainly religious, though socially unacceptable, premises.[66]

Taking its cue from the President's frequent calls for religious cooperation and furthering religious freedom,[67] the Committee strongly endorsed ecumen-

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61. Advisory Committee on Religious Freedom Abroad, Interim Report to the Secretary of State and to the President of the United States, Released by the Bureau of Democracy, Human Rights, and Labor 5 (Jan. 23, 1998) <http://www.state.gov/www/global/human_rights/980123_acrfa_interim. html>.

62. *Id.*

63. *Id.* at 8.

64. *See id.* at 15 ("Religious institutions provide far more than opportunities for worship: they provide leadership, education, political legitimacy, and systems of law and adjudication.").

65. *Id.*

66. *See id.* One of the most striking ways in which President Clinton and the culture whitewash religion is by labeling white supremacist groups, many of which draw their principles directly from religious traditions, especially Christianity, as "hate groups." Thus, as a rhetorical matter, President Clinton can take a strong stand against such groups and simultaneously favor strong free exercise rights. The distinction has led to inherent contradictions, however, in Administration policy. For example, the Religious Freedom Restoration Act and the Religious Liberty Protection Act provided the same means to circumvent the law to hate groups challenging criminal convictions as they would have given to any other religious group.

67. *See id.* ("The President has publicly affirmed his commitment to advancing religious freedom as a U.S. foreign policy priority and as an issue of concern to the Administration and the American people. The President has raised the issue directly with leaders of other governments. . . . The President has hosted a wide variety of meetings attended by representatives of diverse religions [and] eminent religious leaders from around the world to discuss critical issues affecting religious communities and U.S. diplomatic efforts to advance religious freedom. During his travels abroad, the President has also visited leading religious figures.").

ism and interfaith dialogue for the purpose of conflict resolution and prevention around the world. It defines "ecumenism" as the "growing development of relationships among the Christian churches throughout the world" and "interfaith dialogue" as "the development of bilateral and multilateral relations between and among religious traditions."[68] With the same degree of optimism that President Clinton has applied to the concept of political ecumenism, the Committee looked to "transform the dynamic of inter-religious relationships from perpetual antagonism to partnership."[69]

The Clinton Administration's policy of encouraging religious entities to work together and to work more closely with government created a favorable climate for the rise to power of one of the most extraordinary organizations of religious entities in U.S. history: the Coalition for the Free Exercise of Religion. The Coalition, which started as a collection of mainline religions and civil liberties groups, was formed for the purpose of overturning the Supreme Court's decision in *Employment Division v. Smith.*[70] Its members drafted the Religious Freedom Restoration Act ("RFRA") for that purpose and then, at President Clinton's invitation, continued to push for free exercise on a number of fronts, including free exercise in the public schools,[71] the federal workplace,[72] and foreign policy.[73] In effect, on free exercise issues, President Clinton has anointed a Clergy Cabinet.

The Coalition for the Free Exercise of Religion should not be confused with the Christian Coalition, a group of like-minded, conservative Christians with a shared political agenda.[74] In contrast, the former was a group of religious entities that normally would not share a political platform. For example, RFRA was drafted by Coalition members Mike Farris of the conservative Home School Legal Defense Fund with Marc Stern of the liberal American Jewish Congress, among others. Christian Scientists joined forces with Presbyterians and Methodists. Secular groups were brought under the Coalition's umbrella as well, including People for the American Way, the ACLU, and Americans United for Separation of Church and State. These were not natural political allies, but they were able to rally around an initial cause: getting RFRA passed and finding the door of the White House open to their suggestions. Moreover, they expanded their interest and influence beyond RFRA to free exercise guidelines for the public schools and the federal workplace and to the issue of international religious persecution.

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68. *Id.* at 17.

69. *Id.*

70. 494 U.S. 872 (1990).

71. *See infra* notes 194-99 and accompanying text.

72. *See infra* note 77 and accompanying text.

73. *See infra* note 130 and accompanying text.

74. Indeed, the Christian Coalition's single-minded political agenda eventually led the Internal Revenue Service to conclude that it was not a religious organization deserving tax-exempt status, but rather a political action committee. *See* David E. Rosenbaum, *Tax-Exempt Status Rejected, Christian Coalition Regroups*, N.Y. TIMES, at A16 (June 11, 1999).

President Clinton has treated the Coalition's diverse membership as proof that his "one America" notion works. He has taken special pride in the Coalition, saying that "nothing has given [him] greater satisfaction."[75] He calls the coalition the "living embodiment of . . . one America, people coming together across the lines of faith and political conviction and race to protect the religious liberties we all cherish."[76] The Coalition's diversity proved to him, and to Congress, that RFRA must be sound policy. Similarly, on the day he dedicated the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace,[77] he explicitly thanked the Coalition members for their "support" and "guidance" and then thanked leading members of the Coalition personally, including Steve McFarland, Marc Stern, Eliot Mincberg, Buzz Thomas, and Rabbi David Saperstein.[78]

The Coalition never fully realized President Clinton's dream of a thoroughly diverse religious coalition. The Catholic Church, for example, while willing to partake of the benefits of the Coalition's efforts,[79] refused to join. Marginal religions, such as the Scientologists, were rejected. Fringe religions, such as the white supremacist Aryan Brotherhood and the World Church of the Creator, and other religions such as Santeria, Wiccans, Satanists, and Luciferians were not invited, nor would they have been permitted to join.[80]

Even with the exclusion of controversial religions, the Coalition has found the task of coordinating the various religions' views to be a time- and energy-consuming task. Each of the members' usual political agendas had to be subjugated to the group's overarching goals. For example, the American Jewish Congress, normally an organization that would support civil rights laws, found itself co-signing a letter with the Christian Legal Society, which stated that one of the main motivations for pursuing RFRA was to permit religious individuals to trump fair housing laws.[81] In addition, the Christian Scientists' agenda to create religious exemptions for all prosecutions and civil lawsuits arising out of medical neglect has not been one that mainline Protestant churches have supported, either theologically or morally.

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75. Guidelines Remarks, *supra* note 43.

76. *Id.*

77. *See* Memorandum on Religious Exercise and Religious Expression in the Federal Workplace, 33 WEEKLY COMP. PRES. DOC. 1246 (Aug. 14, 1997).

78. Guidelines Remarks, *supra* note 43. Steve McFarland was later appointed to be Executive Director of the new U.S. Commission on International Religious Freedom. *See Religious Freedom Panel Gets Executive Director*, DESERET NEWS, Sept. 11, 1999, at E2; *see also infra* note 205 and accompanying text.

79. The Catholic Church initially opposed RFRA in Congress because of concerns about its impact on abortion issues. The Catholic Church, however, was the litigant that brought the RFRA case that eventually made it to the Supreme Court. *See* City of City of Boerne v. Flores, 521 U.S. 507 (1997). Later, the Church testified that it had not supported RFRA because the RFRA standard was not the standard in place before *Smith*, but rather a much more stringent standard. *Supreme Court Decision on Religious Issues: Hearings of the House Comm. On the Judiciary*, 104th Cong. 1997, *available at* WL 11234761 (1997) (statement of Mark E. Chopko, General Counsel, United States Catholic Conference).

80. *See* Coalition for the Free Exercise of Religion Members (last visited Oct. 6, 2000) <http://www.religious-freedom. org/coalition.html>.

81. Letter on file with the author.

The Coalition's solution to its members' deep, internal moral and theological differences was to reach an agreement that whenever a RFRA was introduced in Congress or the fifty states, they would not agree to any amendments of any kind. When various representatives asked why the bill ought to apply to specific issues ranging from land use, to child abuse, and the civil rights laws, their no-exemption policy permitted them to side-step a substantive debate on specific issues. While they used this strategy as a means of avoiding public discussions on points of conflict, they also used it as a device to keep their inherent internal discord from consuming their powerful ecumenical force.

The Coalition's no-amendment policy, necessary to its survival, was rejected in Texas when the state legislature exempted land use laws and civil rights laws from its reach, with the result that some of the Coalition's conservative Christian members asked Governor Bush to veto the bill. With RFRA's successor, the Religious Liberty Protection Act of 1999,[82] the Coalition continued to attempt to maintain the no-amendment position, though with increasing difficulty. During mark-up of the bill in the House Judiciary Committee, Representative Barney Frank declared his suspicion of groups that tell representatives not to alter their proposals, saying that members of Congress are finally responsible for what laws are passed.[83]

As Madison would have predicted, President Clinton's ideal social and ecumenical organization resulted in a political organization with potent power, but equally potent centrifugal forces. Five years into the creation of the Coalition, the ACLU and People for the American Way turned their backs on the RFRA formulation to the extent that it affected anti-discrimination laws. The California arm of the Coalition disintegrated in the spring of 1999. In September 1999, eleven of the more liberal members of the Coalition, including Americans United for Separation of Church and State, withdrew over differences of opinion on important policy issues.[84] Framer James Madison would have predicted and celebrated this dissension in the ranks.

President Clinton's rhetoric fostering ecumenical forces in politics distinguishes him sharply from Madison's vision of the proper relationship between government and religion.[85] Madison would have feared the accumulation of power represented by the Coalition, and he would have urged the various organizations to factionalize. The fracture of the Coalition in 1999 was a sign of the idealistic quality of President Clinton's vision and a signal that Madison's vision was closer to the mark. It is not a stretch to characterize President Clinton's stance as anti-Madisonian.

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82. H.R. 1691, 106th Cong. (1999).

83. Rep. Barney Frank, Comments on the Mark-up of the Religious Liberty Protection Act of 1999, 145 Cong. Rec. H5580-02, * H5592-93 (July 15, 1999).

84. *See Support for Liberty Act is Fraying*, DALLAS MORNING NEWS, Sept. 25, 1999, at 6G.

85. *See supra* notes 14-26 and accompanying text.

III

THE ACTIONS

Under the President's enthusiastic guidance, the Clinton Administration has worked vigorously in all three federal branches to increase the ability of religious organizations and individuals to exercise their religion. Actions taken to ensure the separation of church and state, however, are conspicuously absent from the Administration's record.

A. In the Congress

During the Clinton era, Congress has considered and adopted a wide array of legislation favoring religion's interests. From domestic and international religious liberty legislation to federal medical funding for Christian Scientists, the Administration consistently has backed religion-friendly legislation.

1. RFRA and RLPA. If any single historical event before he became President invited President Clinton to turn his presidency toward free exercise values, it was the Supreme Court's decision in 1990 in *Employment Division v. Smith*.[86] In that case, decided two years before he was elected, an increasingly conservative Supreme Court issued an opinion authored by one of its most conservative members, Justice Antonin Scalia, declaring that the Free Exercise Clause does not mandate government accommodation of religious conduct when the government has enacted a neutral and generally applicable law.[87] Between the lines, the Court stated that targeting of particular religions and discrimination against religion would violate the Clause, but without such evidence, the government's actions should receive very low-level scrutiny.[88]

In fact, the Court never had been particularly hospitable to religious conduct claims.[89] Before *Smith* was announced, however, there had been some cases, mostly involving unemployment compensation and mandatory school-attendance laws, in which the Court had applied strict scrutiny and in which the religious conduct claimants had won.[90] The press and the emerging Coalition for the Free Exercise of Religion heaped scorn on the Court for its supposed wholesale departure from the First Amendment, with Justice Scalia receiving the most ridicule, setting the stage for Congress to consider the Coalition's Re-

86. 494 U.S. 872 (1990).

87. *See id.* at 879.

88. *See id.* at 901.

89. I make the case, in laborious fashion, that the Court has never been particularly receptive to religious conduct claims in *The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure To Protect Religious Conduct*, 54 OHIO ST. L.J. 713 (1993). That analysis remains sound. The rest of the article, which argues for extraordinary scrutiny of government actions under the Free Exercise Clause, should be deservedly criticized as the musings of a young and ill-informed scholar, too much at home in the ivory tower.

90. *See* Sherbert v. Verner, 374 U.S. 398 (1963); s*ee also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1986); Thomas v. Review Bd. 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972).

ligious Freedom Restoration Act. RFRA was introduced in 1992 and again in 1993, but was not passed until ten months into President Clinton's first term.[91]

RFRA introduced the strictest of scrutiny in all cases involving generally applicable, neutral laws that substantially burdened religion. Government, whether federal, state, or local, could not enforce its general laws against religious individuals claiming such a burden unless it could prove that the law was passed pursuant to a compelling interest and was the least restrictive means of achieving that interest.[92]

RFRA was strong medicine for government and a coup for religious interests. For free exercise cases, it placed a much heavier burden on the government in particular arenas where the Supreme Court had already spoken, such as the prisons.[93] It also set a high level of scrutiny in a huge number of arenas for which the Supreme Court had yet to announce a standard. Its goal of increasing the power of religion to spurn general laws was reached at the expense of core constitutional values, including the separation of powers, federalism, circumscribed power to amend the Constitution, and separation of church and state.[94] These constitutional values were left unexamined by the President in his enthusiasm for fostering free exercise.[95]

RFRA became the law on President Clinton's watch, and he heralded its passage in his signing statement, which includes the themes of ecumenism, the importance of free exercise, and, true to form, no expressed concerns about establishment values:

> We all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom. Usually the signing of legislation by a President is a ministerial act, often a quiet ending to a turbulent legislative process. Today this event assumes a more majestic quality because of our ability together to affirm the historic role that people of faith have played in the history of this country . . . . [O]ur laws should not impede or hinder but rather should protect and preserve fundamental religious liberties.[96]

Two years into its effect, Clinton stated that his "[A]dministration strongly supported the [Act and has] worked very hard to implement it in a good faith way."[97] His Administration also worked to clear the constitutional obstacles in RFRA's path. When Senator Orrin Hatch notified the Clinton Administration

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91. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as 42 U.S.C. § 2000bb (1994)).

92. *See* 42 U.S.C. § 2000bb-1(a) to -(b) (1994).

93. *See* Smith, 494 U.S. at 900-03 (O'Connor, J., concurring).

94. *See* City of Boerne v. Flores 521 U.S. 507 (1997) (Stevens, J., concurring); s*ee also* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 120-35 (1996); Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998); Marci A. Hamilton, City of Boerne v. Flores: *A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699 (1998).

95. He was particularly unconcerned about the fact that Congress was reversing the Supreme Court's definitive interpretation of the First Amendment. *See* RFRA Remarks, *supra* note 1 (lauding Congress for "revers[ing] by legislation, a decision of the United States Supreme Court").

96. *Id.*

97. *See* Interview with Religious Journalists, *supra* note 56, at 173.

that the Department of Justice was attacking the constitutionality of RFRA as part of a case in which the Administration was defending federal bankruptcy laws involving tithing by pre-petition bankrupt parties, President Clinton ordered the Department of Justice to reverse itself.[98] Hours before the oral argument in the case before the United States Court of Appeals for the Eighth Circuit, the federal government's representative was removed from the case. Since then, all federal agencies and the Department of Justice have been forbidden to raise the constitutional defects of RFRA in litigation defending a federal law, either administrative or legislative.

In 1997, RFRA was declared unconstitutional in *City of Boerne v. Flores*,[99] a decision President Clinton publicly criticized and then narrowly construed to mean that RFRA had been struck down only with respect to state laws.[100] As a result, the Administration continues to observe RFRA's constraints on all of its actions and continues to forbid constitutional challenges to RFRA by any federal entity. Thus, federal entities can and have argued that federal laws survive RFRA's scrutiny, but they have not argued that the statute is unconstitutional.[101] This is a particularly deft move on behalf of organized religion because it has made it difficult to challenge RFRA's constitutionality as applied to federal law. In the vast majority of cases involving RFRA's application to federal law, the only means by which its constitutionality can be addressed is through the Court's *sua sponte* consideration of the issue.[102]

Presumably with President Clinton's encouragement, the Coalition for the Free Exercise of Religion did not rest with the *Boerne* decision, but rather drafted another bill intended to fill the gap left by the Court's invalidation of RFRA. In 1998 and again in 1999, the Religious Liberty Protection Act ("RLPA") was introduced, once again drafted by the Coalition. RLPA would have instituted the same strict scrutiny test, but under the Commerce and

98. *See Religious Liberty and Charitable Donation Protection Act of 1998*, S. 1244, 144 CONG. REC. S. 4769, 4771 (May 13, 1998) (statement of Sen. Hatch) ("Under pressure from me and others in Congress, the Justice Department reversed itself [in *In re Young*] on direct orders from the President.").

99. 521 U.S. 507 (1997).

100. *See* Guideline Remarks, *supra* note 43.

101. *Cf.* Cassel v. Mennonite Conference, Nos. 93-1436, 93-1464, 1993 U.S. App. LEXIS 35505, at *1 (3d Cir. Dec. 6, 1993) (unpublished opinion) (involving child labor laws in which federal government won under RFRA but never raised constitutional questions). Chaplains in the Federal Bureau of Prisons have told me that they have been instructed not to challenge RFRA and to be extremely accommodating to prisoner's RFRA claims so as to prevent such disputes from reaching the federal courts. At the same time, they have insisted on anonymity for fear of losing their jobs if they were critical of RFRA in public.

102. In *United States v. Sandia*, 6 F. Supp. 2d 1278, 1280 (D.N.M. 1997), the Court considered the constitutionality of RFRA as applied to federal law despite the fact that both parties argued that RFRA is constitutional. The Court rejected the argument that it is constitutional, reasoning that *Boerne* rests on separation-of-powers principles that dictate its unconstitutionality across the board. The one arena where a private entity might have been able to raise RFRA's constitutional defects was in the bankruptcy context. *See, e.g.,* In re Young, 141 F.3d 854 (8th Cir. 1998). The bankruptcy law was amended, however, to foreclose most of these suits. *See* Religious Liberty and Charitable Donation Act of 1997, Pub. L. No. 105-183, 112 Stat. 517 (codified at 11 U.S.C. § 548(d) (1998)).

Spending Clauses.[103] It also would have federalized local, land-use law to the benefit of religious individuals and organizations.[104]

RLPA faced a stronger challenge than had RFRA, because various groups negatively affected by the RFRA/RLPA strict scrutiny formulation began to stir.[105] Former supporters of RFRA as politically disparate as the ACLU and the Home School Legal Defense Fund opposed various aspects of RLPA.[106] The ACLU and the NAACP were particularly concerned about RLPA's potential to dilute the civil rights laws when applied to religious individuals, a concern that presumably President Clinton would have shared in other contexts.[107] Still, when it passed the House in July 1999 without any amendment responsive to the civil liberties groups' concerns, President Clinton heralded it.[108]

The story of RFRA and RLPA illustrates rather nicely the fundamental difference between the climate for religion created by President Clinton and the climate fostered by Madison. Under Madison's vision, society is safest when religious sects retain their separate and often conflicting identities and agendas. As a result, each sect checks other sects, and the debate is sharpened by opposing views. There is no monolithic religious power. When the organized religions come together under a single umbrella, as President Clinton has urged, those advantages are lost.

By becoming a single force, the members of the Coalition caused the political landscape to change radically. Each member of the Coalition submerged its

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103. *See* H.R. 1691, 105th Cong. § 2 (1999).

104. *See id.* § 3.

105. Letter from Ann Alexander, Chair, Christian Environmental Council, to Hon. Charles Canady, Chairman, House Subcommittee on the Constitution (July 13, 1999); Letter from Joel J. Alpert, President, American Academy of Pediatrics, to Hon. Henry J. Hyde, Chair, House Judiciary Committee (June 22, 1999); Letter from Kent Barwick, President, The Municipal Art Society of New York, to Members of Congress (July 14, 1999); Joint letter from Council of State Governments, National Association of Counties, National League of Cities, United States Conference of Mayors and International City/County Management Association, to All Members of the House of Representatives (July 13, 1999); Letter from Michael P. Farris, President, Home School Legal Defense Association, to Members of Congress (June 29, 1999); Letter from Ellen Johnson, President, American Atheists, to Senator Patrick Leahy (July 12, 1999); Letter from Christopher K. McKenzie, Executive Director, California National League of Cities, to Hon. Dianne Feinstein, U.S. Senate (July 28, 1999); Letter from Laura W. Murphy, Director, Christopher E. Anders, Legislative Counsel, and Terri A. Schroeder, Legislative Analyst, American Civil Liberties Union, to U.S. House of Representatives (May 5, 1999); Letter from National Association of Attorneys General, to Members of House Judiciary Committee (May 21, 1999); Letter from Rita Swan, Children's Healthcare Is a Legal Duty, Inc., to Hon. Henry J. Hyde, Chair, House Judiciary Committee (July 12, 1999); Letter from Betty Lou Ward, President, National Association of Counties and Clarence E. Anthony, President, National League of Cities to Hon. Henry J. Hyde, Chair, House Judiciary Committee (May 24, 1999) (on file with author).

106. *See Religious Liberty: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union) <http://www.senate.gov/~judiciary/62339cea.htm>; *Statement before the Sen. Comm. on the Judiciary, The Religious Liberty Protection Act of 1999* (June 23, 1999)*; see also id.* (statement of Michael P. Farris, President, Home School Legal Defense Association).

107. *See* Statement of Christopher E. Anders, *supra* note 106; Letter from Elaine Jones, Director-Counsel and Raed Colfax, Assistant Counsel, NAACP, to Hon. John Conyers, Jr., U.S. Congress (July 14, 1999) (on file with author).

108. *See* Editorial, *Religion and State; It Remains Unclear Why the Religious Liberty Protection Act Is Necessary*, FORT WORTH STAR-TELEGRAM, Aug. 15, 1999, at 2.

group's usual, specific agenda to the larger, more abstract agenda of furthering religious free exercise that was expressed in RFRA in arcane language. At the time of the framing of RFRA, in fact, the bill was conceived at such an abstract level that those most negatively affected by it had no idea they would be.[109] While the members of the Coalition normally would be at odds on a wide variety of social issues—including discrimination on the basis of sexual orientation, child neglect, and abuse—and the appropriateness of land use and safety laws as applied to church-operated day care and senior centers, RFRA's abstract and arcane formulation permitted them to come together united in a common cause. Because of their unification behind a single, abstract cause, each religious sect's specific agendas were not aired during the first several years of hearings on RFRA.

As the cases developed under RFRA, though, and groups negatively affected became educated about it, RFRA's negative consequences became increasingly apparent. Thus, once the Coalition began to advocate the state RFRAs and RLPA following *City of Boerne v. Flores*, they faced specific objections to the bill. Only at that stage, which was approximately five to seven years following the first drafting of RFRA in 1990, were the various entities in the Coalition prompted to begin to provide specific explanations regarding their particular agendas with respect to the RFRA/RLPA formulation. In response to this challenge to particularize the debate over RFRA, the Coalition fought to retain the source of its extraordinary political power—its unified status—by mutually pledging a no-exemption policy.[110]

The Coalition, however, splintered into the factions that Madison would have thought were safer to the political order: factions that insist on their own, particular agendas rather than consolidate their power behind an abstract agenda. For President Clinton, the end of the Coalition is a failure; for Madison, it would have been preordained.

2. Medicare and Medicaid for Christian Scientists. Although Christian Scientists do not believe in modern medical care, they have received federal money under both the Medicare and the Medicaid federal statutes and regulations, which explicitly named the Christian Science Church for many years.[111] In 1996, in a lawsuit brought by a children's advocacy group, CHILD, Inc., a federal trial court ruled that the practice violated the Establishment

109. *See* Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994).

110. *See supra* note 82 and accompanying text.

111. *See* Medicare Act, 42 U.S.C. §§ 1395-1395zz (1994) ("Most providers of health care under the Medicare Act are required to meet statutory and regulatory standards from which Christian Science sanitoria are exempted, and these exemptions form the basis of their claim under the Medicare Act."); *see also* Children's Healthcare Is a Legal Duty, Inc. v. Vladeck, 938 F. Supp. 1466, 1469 (D. Minn. 1996). The bill "would therefore exempt Christian Science sanatoriums from the requirements for a licensed nursing home administrator and other inappropriate medical requirements of the Medicaid program." *Id.* at 1475 (quoting H.R. REP. NO. 92-231 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4989, 5106).

Clause.[112] The court reasoned that the government could not single out a particular religion for special treatment.[113]

Congress's response, which was signed into law by the President, was to amend the Medicare and Medicaid laws by eliminating specific reference to the Christian Science Church.[114] The new law provides for coverage of "religious nonmedical health care," including "nonmedical nursing items and services."[115] In other words, the language continues to cover Christian Science sanitoria, apparently exclusively, but is formally neutral. The new legislation is a plain attempt to retain the status quo for the Christian Scientists, who reportedly have collected fifty million dollars through federal Medicare and Medicaid payments.[116]

3. Religious Liberty and Charitable Donation Protection Act of 1998. Under federal bankruptcy law, payments made by debtors during the year before declaration of bankruptcy may be avoided by the bankruptcy trustee. As a result, donations made to churches during that year can be recovered from the church.[117] Members of Congress thought RFRA would resolve these conflicts between trustees and churches in favor of the churches.[118] When RFRA was invalidated, members of Congress introduced the Religious Liberty and Charitable Donation Protection Act of 1998 to protect churches from bankruptcy trustees in such situations.[119] The bill prevents trustees from recovering religious or charitable donations during the year preceding bankruptcy where the donation was no more than fifteen percent of the donor's gross income, or where there is a record that the donor regularly gave more than fifteen percent.[120] The bill, though, does attempt to prevent fraudulent transfers on the eve of bankruptcy.

Prominent members of the Coalition for the Free Exercise of Religion strongly supported the bill. Representative Nadler introduced letters from the Christian Legal Society, Professor Douglas Laycock, and the Home School Legal Defense Association into the record.[121]

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112. *See Children's Healthcare*, 938 F. Supp. at 1479-80 (holding unconstitutional a regulation mandating payments for Christian Science members because it was sect-specific) (appeal mooted by subsequent legislation). After the Act was amended so that it did not explicitly aid Christian Scientists, although Christian Scientists are the only sect that fit the statute's new description, the district court held that it was constitutional in an unreported opinion. That decision was recently affirmed by the Eighth Circuit. *See* Children's Healthcare is a Legal Duty v. Min De Parle, 212 F.3d 1084 (8th Cir. 2000).

113. *See* Children's Healthcare, 938 F. Supp. at 1479-80.

114. Conditions for Coverage of Religious Nonmedical Health Care Institutional Services, Pub. L. No. 105-33, 111 Stat. 428 (codified as amended at 42 U.S.C.S. § 1395i-5 (1999)).

115. 42 U.S.C.S. § 1395x(ss)(1)(C) (1999).

116. *See* Avram Goldstein, *Faith and Medicare Funding; Payments to Christian Science Nursing Centers*, WASH. POST, Mar. 22, 1999, at A1.

117. *See* In re Young, 114 F.3d 854 (8th Cir. 1998).

118. *See* 144 CONG. REC. S4769 (May 13, 1998) (statement of Sen. Grassley).

119. H.R. 2604, S. 1244, 105th Cong. (1998).

120. *Id.* § (a)(2)(A).

121. *See* 144 CONG. REC. H3999 (June 3, 1998) (statement of Rep. Nadler).

One of the most striking elements of the legislative history, including the President's signing statement, is that the bill was motivated mostly by concerns about the fiscal soundness of the churches asked to repay the contributions. Senate sponsor Charles Grassley argued in favor of the bill on the ground that churches operate "entirely on contributions without any significant reserve funds."[122] Senator Hatch echoed this concern, saying that "churches find it very difficult to make up money that has already been spent, and when they can, it weakens their ability to do the charitable and spiritual work that is part of the grand tradition of religious charity in America."[123] The bill's House sponsor, Representative Ron Packard, argued that "churches and charitable organizations across this country live from hand to mouth, when what comes into the collection plate on one day is usually spent the next."[124] He argued that under the existing bankruptcy laws, the churches were being "put in a position of hardship."[125] Representative Ken Bentsen voiced the same concern, referring to churches' "small budgets."[126] Upon signing the bill, President Clinton discussed the importance of the "fiscal responsibility" of religious and charitable institutions.[127]

The concerns about the fiscal integrity of many churches were based in reality. Many mainline churches are suffering serious fiscal constraints.[128] This provides a rare glimpse into a congressional and presidential partnership working to protect churches' income and fiscal soundness. Once again, it is a far cry from Madison's arguments against using the state to ensure that coffers of organized religion are not empty.[129]

4. International Religious Freedom Act. One of the signature pieces of legislation furthering free exercise during the Clinton era is the International Religious Freedom Act of 1998 ("IRFA").[130] The Clinton Administration enthusiastically supported it, and Congress unanimously passed it.[131] Fostering religious liberty is a major goal in President Clinton's agenda, not only at home but also abroad. This Act would appear to prove the State Department's claim that Congress and the Clinton Administration have "focused greater attention on this issue than any predecessor."[132]

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122. Press release available at <http://www.senate.gov/~grassley/releases/1998/p8r06-20.htm> (last visited Oct. 6, 2000).

123. 144 CONG. REC. S4769, S4770 (May 13, 1998) (statement of Sen. Hatch).

124. *Id.* H3999 (June 3, 1998) (statement of Rep. Packwood).

125. *Id.*

126. *Id.* (statement of Rep. Bentsen).

127. Statement on Signing the Religious Liberty and Charitable Donation Protection Act, 34 WEEKLY COMP. PRES. DOC. 1178 (June 19, 1998).

128. *See, e.g.*, ROBERT WUTHNOW, THE CRISIS IN THE CHURCHES: SPIRITUAL MALAISE, FISCAL WOE (1997).

129. *See* Madison, *supra* note 20.

130. *See, e.g.*, WUTHNOW, *supra* note 128.

131. *See* Pub. L. No. 105-292, 112 Stat. 2787 (codified as amended at 22 U.S.C. § 6401 (1994)).

132. Testimony of John Shattuck, *supra* note 2, at 8.

Even before IRFA, the Clinton Administration instituted an Advisory Committee on Religious Freedom Abroad to submit a report on international free exercise issues to the Secretary of State and the President.[133] The Committee's final report reached the following conclusions:

> Promoting religious liberty and opposing its suppression constitute basic American values and are proper, important, and necessary U.S. foreign policy objectives.
>
> Protecting and expanding religious liberty, although increasing in prominence, deserves more consideration in U.S. foreign policy than it has received.
>
> Coordinating such an objective within an overall policy framework that pursues multiple and sometimes competing goals is indispensable to effective policy.
>
> The U.S., as a world leader committed to universal human rights and as a country with a diverse religious population, must be attentive to the rights of all religions. It must seek to speak with a consistent voice in support of religious rights, regardless of the religious group that suffers from discrimination or the ties of friendship or interest with the governments that may cause the discrimination.[134]

President Clinton's emphasis on ecumenism is never far behind any of his Administration's actions with respect to religion. One of the subcommittees of the Advisory Committee, the Subcommittee on Outreach and Dialogue at Home and Abroad, embraced the very Clintonian objective of determining how religious communities can help advance religious freedom and "identify areas for cooperation between religious and other communities."[135]

Also before IRFA, the Clinton Administration issued "a series of unprecedented worldwide cables" focusing on religious liberty issues, as well as directives to State Department employees and foreign governments declaring that "the promotion and protection of religious freedom is a key component of [its] human rights policy."[136] Thus, even before IRFA was passed, U.S. embassies and diplomats were "interven[ing] more aggressively on behalf of religious freedom" across the globe.[137]

IRFA ratchets up the importance of religious liberty issues in all foreign policy decisions and missions.[138] Its stated purpose is to "condemn violations of religious freedom, and to promote, and to assist other governments in the promotion of, the fundamental right to freedom of religion."[139] Its ambitious goal is to foster religious freedom by "all governments and peoples."[140] It requires the appointment of an Ambassador at Large for International Religious Freedom,

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133. Interim Report of the Advisory Committee on Religious Freedom Abroad to the Secretary of State and to the President of the United States (Jan. 23, 1998); *see generally* Final Report of the Advisory Committee, *supra* note 2.

134. Final Report of the Advisory Committee, *supra* note 2, at 55.

135. *Id*. at 54.

136. Testimony of John Shattuck, *supra* note 2, at 4.

137. *Id.*

138. *See* Final Report of the Advisory Committee, *supra* note 2, *available at* <http://www.state.gov/www/global/human_rights/990517_report/execsumm_ivhtml#recs> (explaining that with IRFA, "the landscape has changed notably").

139. International Religious Freedom Act of 1998, 22 U.S.C. § 6401(b)(1) (1994).

140. *Id*. § 6401(b)(5).

who is a principal adviser to and under the direction of the President and the Secretary of State.[141] By September 1 of each year, the Ambassador at Large is required to submit to Congress a report on international religious freedom, including descriptions of religious freedom in each foreign country, violations, and trends toward improvement.[142] It also creates a U.S. Commission on International Religious Freedom, which is a committee of distinguished experts on international religious issues,[143] and the position of Special Adviser to the President on International Religious Freedom in the National Security Council.[144] In addition, it directs the President to take action against foreign countries that abridge religious freedom and to report on those actions annually to Congress.[145]

IRFA reinforces President Clinton's ideals of bringing the government closer to religious entities and religious entities closer to one another. It directs U.S. chiefs of mission to "seek out and contact religious nongovernmental organizations" and "to seek to meet with imprisoned religious leaders."[146] As a means of increasing access to such organizations and of informing the public of international religious freedom issues, the Act also requires the institution of a religious freedom internet site.[147]

Finally, it amends national refugee and asylum policy, and prohibits foreign government officials from admission to the United States if they have engaged in particularly severe violations of religious freedom.[148]

In sum, IRFA makes the enforcement of religious freedom worldwide a foreign policy priority and does so through a number of different mechanisms. IRFA is not merely hortatory, but rather makes significant additions to the top-level teams that advise the President, including the State Department and the National Security Council, to make free exercise issues a foreign policy priority.

5. Other Legislation. A handful of additional legislation intended to favor religious entities has been passed during the Clinton era.

a. Directed sale of land owned by the old soldier's home to Catholic University. The Old Soldier's retirement home has been in fiscal trouble for many years. Congress authorized the Department of Defense to increase the deductions from the pay of soldiers intended for the Home from fifty cents to one dollar per month, but the Clinton Administration took no action on this authorization.

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141. *See id*. § 6411(b).

142. *See id*. § 6412(b)(1). The Act also requires amendments to human rights reports for countries receiving economic assistance and for countries receiving security assistance to include a status report on the state of religious liberty in those countries. *See id*. § 6412(d).

143. *See id*. § 6431(a).

144. *See* National Security Act of 1947, 50 U.S.C. § 402(i) (1994).

145. *See* 22 U.S.C. § 6412(b)(1)(B).

146. *Id*. § 6414.

147. *See id*. § 6413.

148. *See id*. §§ 6471-73.

Because it owns valuable property in Washington, D.C., the Home requested of Congress permission to sell forty-nine acres of the property. Initially, Congress authorized the sale, leaving the particulars of the sale to the Home and its board.[149] The Home pursued a public/private venture with a local developer, LCOR, working toward a lease arrangement that would not require the Home to release ownership of the land, but would establish a stream of income to support the Home.

A year later, however, Senator Rick Santorum, at Senator Edward Kennedy's urging, introduced an amendment to the Defense Authorization bill that would direct the Home to sell the land only to a "neighboring" nonprofit entity, Catholic University, which was interested in building a "Peace Center."[150] The President signed the bill into law, and few took notice except the veterans who feared that a single buyer would not guarantee the highest bid, which was necessary to preserve the Home. Press coverage and the threat of a lawsuit encouraged Congress to amend the directed sale legislation.[151] The amendments nullified the directed sale requirement but still provided Catholic University with the right to match any offer made, a prohibition on any public/private arrangements, and a one-year time limit for the sale to be completed.[152] The Clinton Administration has not said a word about the sale, or the obvious establishment concerns inherent in a directed sale to a religious institution. The Administration did announce during the drafting of the amendments to the directed sale, however, that it would proceed with the increase in soldiers' pay deductions.[153]

b. The Church Arson Prevention Act of 1996. The Church Arson Prevention Act of 1996 was passed to amend the already existing law prohibiting violence against churches, in response to a number of arson-caused fires in churches.[154] The Act eliminated the ten-thousand dollar minimum damage requirement in the former law,[155] and provided that destruction of religious real property motivated by racial animus constituted a violation of the statute.[156] As a result, more church attacks could be brought under federal law.

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149. *See* National Defense Authorization Act for Fiscal Year 1997, P.L. No. 104-201, § 1053, 110 Stat. 2422, 2650-51 (1996).

150. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, P.L. No. 105-261, § 1043, 112 Stat. 1920, 2025 (1998).

151. *See* National Defense Authorization for Fiscal Year 2000, P.L. No. 106-65, § 384, 113 Stat. 512, 584 (1999). In the interest of full disclosure, I represented a number of veterans at this time, and announced that we would be filing a federal lawsuit against the directed sale legislation unless it was amended.

152. *See id.*

153. *See* Dale Eisman, *Vets, Church Struggle Over 49-Acre Parcel in Washington*, VIRGINIAN-PILOT, Mar. 22, 1999, at A1.

154. Pub. L. 104-155, 110 Stat. 1392 (codified as amended at 18 U.S.C. § 241 (1994)).

155. *See* 18 U.S.C. § 241

156. *See id*. § 247.

The Act also doubled the maximum sentence for such crimes[157] and extended the statute of limitations.[158]

President Clinton applauded Congress's "swift, unanimous, and bipartisan" enactment of the Act on the day of its signing.[159] His statement on that day was extremely brief because Congress was not in session. When Congress came back into session, President Clinton held a second ceremony with members of Congress present, "so that America could see the breadth and depth of support in the Congress, among religious leaders who are here and community leaders, for this legislation and for this cause."[160] Echoing his ecumenical agenda, he "compliment[ed] all the religious organizations and other groups in this country that have agreed to come together to help to rebuild these churches, showing that we can reach across lines of race and religion and region."[161]

c. Parsonage Tax Exemption and School Prayer Acts. In 1996, Congress amended the Internal Revenue Code to exclude the "rental value of any parsonage" from the net income of any "duly ordained, commissioned, or licensed minister of a church or a member of a religious order."[162] Congress also amended the National Education Reform Act to preclude the use of any federal funds for "policies that prevent voluntary prayer and meditation in public schools."[163] Both laws are obvious responses to requests from religious entitites for favored treatment.

d. The Female Genital Mutilation Bill and the Istook Amendment. The two notable exceptions to the Clinton Administration's aggressive pursuit of free exercise rights are the Female Genital Mutilation Act[164] and the Administration's failure to support the Istook Amendment.[165]

The female genital mutilation bill criminalizes female genital mutilation, which is a religious ritual originating from a number of Middle Eastern and African religious sects. Conviction under the bill entails a fine or imprisonment up to five years, or both. It instructs the courts to apply the provisions without regard to the beliefs of those being mutilated or any other person involved.[166]

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157. *See id*. § 247(d)(3).

158. *See id*. § 247(g).

159. Statement Upon Signing H.R. 3525, 32 WEEKLY COMP. PRES. DOC. 1189 (July 3, 1996).

160. Remarks on the Church Arson Prevention Act, 32 WEEKLY COMP. PRES. DOC. 1221 (July 9, 1996).

161. *Id*.

162. Pub. L. 104-188, 110 Stat. 1818 (codified as amended at 26 U.S.C. § 1402(a)(8) (1994)).

163. 20 U.S.C. § 6061 (1994).

164. Pub. L. No. 104-208, 110 Stat. 3009, 3009-170, 708 (codified at 22 U.S.C. § 262k-2 *and* 18 U.S.C. § 116 (1994)).

165. H.J. Res. 66, 106th Cong. (1999).

166. *See* 18 U.S.C. § 116(c). The impetus behind this bill may not have been the President himself. A search of online news services and presidential documents revealed no statements by President Clinton regarding the female genital mutilation bill. The practice, however, was sharply criticized by First Lady Hillary Rodham Clinton during a trip to Africa. *See, e.g.,* 34 WEEKLY COMP. PRES. DOC. 569 (Apr. 13, 1998) (stating that Hillary Clinton praised individuals for their efforts to "eliminate the

Thus, this bill explicitly authorizes penalties even when the actor is acting out of religious beliefs. This is a rare religious practice that even the Clinton Administration would criminalize.

The Istook Amendment would have made prayer in public schools constitutional.[167] President Clinton did not publicly support this amendment, a position favored by powerful members of the Coalition for the Free Exercise of Religion. Phil Baum and Marc Stern, for the American Jewish Congress, and others lobbied against the Amendment, stating that "[we] will work to ensure that nobody is fooled by Rep[resentative] Istook's twisted logic through which obliterating the Constitution's Establishment Clause—and with it the time-honored American tradition of church-state separation—somehow fills the void left in the wake of the Supreme Court's decision in Boerne."[168] Thus, the President's lack of enthusiasm for the Amendment did not undermine his treasured relationship with the Coalition or cast him automatically as one who is opposed to religion, a perception he would find intolerable.

In sum, Congress, with the President's full support, has aggressively promoted a variety of legislation to protect religious exercise in the domestic and international arenas, with one exception, the female genital mutilation bill. The two most significant pieces of legislation—RFRA and IRFA—have been the product of diverse religious organizations and individuals joining together at the behest of the President.

B. At the Supreme Court

The Supreme Court has considered six cases involving the Religion Clauses during President Clinton's tenure.[169] The Administration, through the Office of the Solicitor General, has weighed in on three of them: *City of Boerne v. Flores*, *Agostini v. Felton*, and *Mitchell v. Helms*. In *Boerne* and *Agostini*, the Administration took a strong position in favor of the religious entities involved in the case. Both times, the Supreme Court declined to adopt the Administration's in-

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ancient custom of female circumcision in Senegal"); Tim Sullivan, *Mrs. Clinton Lashes Out at Female Circumcision*, ASSOC. PRESS, Mar. 23, 1998, *available at* 1998 WL 6647377.

167. *See* H.J. Res. 66, 106th Cong. (1999).

168. *Noting That One Poor Decision Does Not Deserve Another, American Jewish Congress Warns That Dangerous Amendment on Prayer is No Fix for RFRA Decision*, PR NEWSWIRE, Jul. 22, 1997. The proposed amendment "w[ould] get government back in the prayer business" and "force taxpayers to subsidize private religious schools." Cheryl Wetzstein, *GOP Leaders Join Prayers for Religious Amendment*, WASH. TIMES, Sept. 16, 1999, at A8 (quoting Rev. Barry Lynn, Executive Director of Americans United for Separation of Church and State). "The amendment doesn't have a prayer." *Id.* (quoting Catherine LeRoy, People for the American Way). "Too many policies are being advanced under a cloak of religious beliefs. Politicians are looking for gimmicks, using a religious hook to hang their policies on." *Critics: Keep Jesus Out of Politics; Some Religious Leaders Criticize Presidential Candidates for Their Zeal*, ORLANDO SENTINEL, Sept. 16, 1999, at A8 (quoting Mark Pelavin, Religious Action Committee for Reform Judaism).

169. *See* Helms v. Picard, 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom*. Mitchell v. Helms, 119 S. Ct. 2336 (June 14, 1999) (No. 98-1648); City of Boerne v. Flores, 521 U.S. 507 (1997); Agostini v. Felton, 521 U.S. 203 (1997); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

terpretation of the Constitution. In *Mitchell*, the Administration took a less insistent position favoring religious entities, though its record for siding with religious entities remained unblemished.

1. The Challenge to the Religious Freedom Restoration Act. The constitutionality of RFRA was at stake in *City of Boerne v. Flores*.[170] The Clinton Administration took the position that the Supreme Court had erred in *Employment Division v. Smith*[171] and that Congress had ample authority to increase protection for free exercise of religion beyond the Court's interpretation of the First Amendment.[172] The central issue in the case was whether Section Five of the Fourteenth Amendment permits Congress to enact statutes that build on constitutional protections in the absence of evidence of widespread constitutional violations in the states. The Court rejected the Administration's broad reading of Congress's Section Five power, holding that Congress is limited to enforcing constitutional rights under Section Five and that RFRA went well beyond enforcement of rights under the Free Exercise Clause.[173]

2. Remedial Teachers on Public School Grounds. In *Agostini v. Felton*,[174] the issue was whether federally funded remedial instructors could enter the premises of religious private schools. In 1985, the Court had ruled—in the same case—that they could not.[175] The Administration urged the Court to overrule itself,[176] and argued that the earlier decision was based on hypothetical dangers under the Establishment Clause. The Court was urged to require evidence of "real" dangers to establishment values instead.[177] Thus, the Administration advocated a test that favors religious entities in public aid cases, saying that entanglement should be "shown in the record to exist 'to a substantial degree.'"[178]

The Administration's brief was interesting, not particularly for its analysis of the issue in *Agostini* itself, but rather for its general argument favoring a minimalist approach under the Establishment Clause rather than a vigorous approach. The government did not limit its argument to the particular statute at hand, Title I, but rather asserted that the "Court has stressed that religiously affiliated organizations play an important role in the pluralistic aspect of American life, not least in achieving the secular benefits of education."[179] It also sug-

170. 521 U.S. 507 (1997).
171. 494 U.S. 872 (1990).
172. *See* Brief for the United States, 1995 U.S. Briefs 2074 (1997).
173. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
174. 521 U.S. 203 (1997).
175. *See* Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).
176. *See id.*
177. Brief for Secretary of Education, 1996 U.S. Briefs 552 (1997).
178. *Id.* at 10 (quoting Lemon v. Kurtzman, 403 U.S. 602, 617 (1971)).
179. *Id.*

gested that religious institutions accomplish a mix of objectives and that "[i]t is not the case that . . . sectarian objectives are inextricably intertwined with non-religious ones."[180] Such a distinction opens the door for state aid and invites religious schools to argue for more state aid whenever they can identify a secular objective. The Administration's position would have made it easier for voucher and charitable choice proponents to prevail against Establishment Clause challenges.

The Supreme Court accepted the invitation to overrule *Aguilar*, but it did not take its interpretation of the Establishment Clause to the minimalist position advocated by the Administration. Rather, it drew a distinction between direct and indirect aid, which left open the question regarding the constitutionality of voucher and charitable choice schemes. Direct aid is unconstitutional, according to the Court, while indirect aid remains an open question.[181]

3. Aid to Parochial Schools. In *Mitchell v. Helms*,[182] the Supreme Court was asked to determine whether the federal government may provide computers and other classroom aids to parochial schools as part of a law that provides the same to public schools. The petitioners—parents of parochial school children receiving the federal aid—took an extreme stance, and argued that whenever aid is given to the public schools, it may also be given to parochial schools, on the theory that aid going to both is constitutionally neutral.[183] The Administration's briefs were filed in support of the petitioner.

The Solicitor General did not reject the petitioners' neutrality-is-enough argument outright, but offered a more measured defense of the statute as follows:

> The Court's recent decisions suggest that a more flexible approach is warranted, and that government programs assisting the secular aspects of the educational functions of religious schools should be evaluated in a practical manner and on the facts of each case, to determine whether the assistance has the impermissible effect of advancing or inhibiting religion.[184]

The Solicitor General also provided a more tempered approach than did the petitioners in the sense that he argued for remand on a number of factual issues while still staking out a position that would make it possible for the government to engage in significant funding of parochial school expenses.[185]

The brief is lawyerly, hearkening back to the days when the Solicitor General's office was less politicized. Of the three religion cases at the Court in which the Clinton Administration has participated, *Mitchell v. Helms* illustrates the Administration at its least hyperbolic regarding religion's interests. What-

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180. *Id.*

181. *See* Agostini v. Felton, 521 U.S. 203, 245 (1997) ("[A]id under Title I and Shared Time flowed directly to the schools in the form of classes and programs, as distinct from indirect aid that reaches schools only as a result of independent private choice.").

182. *See* Helms v. Picard, 151 F.3d 347 (5th Cir. 1998), *cert. granted sub nom*. Mitchell v. Helms, 119 S. Ct. 2336 (June 14, 1999) (No. 98-1648).

183. *See* Brief for Petitioners at 45, 1999 U.S. Briefs 1648 (1999).

184. Brief for Secretary of Education at 15, 1998 U.S. Briefs 1648 (1999).

185. *See id*.

ever its rhetoric in this case, though, its record on *siding* with religion remains unblemished.

C. In the Executive Branch

Religious leaders have been actively involved with the President in drafting and advocating initiatives favoring free exercise measures by the Executive Branch. The Clinton Administration has issued guidelines for the free exercise of religion in the federal workplace and in the public schools, added top-level administrators for religious liberty in the State Department and the National Security Council, and declared a National Religious Freedom Day each year.

1. Guidelines on Religious Exercise and Religious Expression in the Federal Workplace. With the aid of the Coalition for the Free Exercise of Religion, the Clinton Administration issued the Guidelines on Religious Exercise and Religious Expression in the Federal Workplace in August 1997.[186] During his remarks on the issuance of the Guidelines, the President issued probably his most effusive endorsement of his ecumenical agenda, praising the Coalition, talking about "one America," and using the Guidelines as evidence of what can be accomplished "when people of good will and faith come together."[187]

The Guidelines are decidedly pro-free exercise. They were intended to increase the opportunity for the free exercise of religion by federal employees at their workplaces "to the greatest extent possible."[188] According to the President, the Guidelines were intended to clarify "that [f]ederal employees may engage in personal religious expression" at work; "that [f]ederal employers may not discriminate in employment on the basis of religion"; and "that an agency must reasonably accommodate employees' religious practices."[189] Federal employees may wear religious jewelry and display religious art in their personal work areas.[190] The Guidelines permit, and even encourage, proselytizing at the workplace, including one-on-one, direct appeals and pamphleteering.[191] They do not preclude employee-led prayer at the end of weekly staff meetings so long as "a reasonable observer would conclude that the prayer was not officially endorsed."[192]

The Guidelines draw the line at "verbal attacks" and coercion.[193] These limitations do reflect some concern with establishment values, but also reflect the intent to push the free exercise of religion to its outermost limits.

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186. Guidelines Remarks, *supra* note 43.

187. *Id.*; *see also* Remarks at the National Prayer Breakfast, *supra* note 60 (thanking attendees at National Prayer Breakfast for "work so many of you in this room have done to help us to protect the rights of Federal employees to follow their faith at work").

188. Guidelines Remarks, *supra* note 43.

189. *Id.*

190. *See* The White House, Office of the Press Secretary, Guidelines on Religious Exercise and Religious Expression in the Federal Workplace 4 (Aug. 14, 1997).

191. *See id.* at 3.

192. *Id.* at 8.

193. *Id.* at 6.

2. Guidelines for Religious Expression in Public Schools. The Clinton Administration also sought to push the envelope of free exercise in the public schools by issuing public school guidelines in 1995.[194] The President directed the Secretary of Education to create the guidelines to "end" the confusion surrounding such issues in the public schools.[195] Of all of the President's actions regarding free exercise, the public school guidelines go the farthest in acknowledging establishment principles. As a result, they are the most constructive contribution from the Clinton Administration on religious issues.

The public school guidelines emphasize that students may engage in "purely private religious speech,"[196] but that they may not harass other students. Moreover, school officials may neither discourage nor encourage such speech; religious speech may not be directed at a captive audience; and those hearing the message must be hearing it voluntarily.[197]

The public school guidelines, as is typical of the Clinton Administration, push free exercise to its conceivable constitutional limits. They expressly condone teaching about religion, religious content in student assignments, and religious pamphleteering by students.[198] Once again, active members of the Coalition for the Free Exercise of Religion assisted in the drafting of the guidelines. Moreover, prominent activists in the Coalition appear in the list of organizations available to answer questions about the guidelines that is appended to them.[199]

3. Amendments to Hate Crimes Penalties in Military Code. On October 6, 1999, the President signed an executive order amending the military criminal code, adding stronger penalties for crimes motivated by hatred based on religion.[200] This is an executive action that reflects the Clinton Administration's enthusiastic support for legislation penalizing hate crimes in general.[201]

4. Additional Executive Branch Appointments to Monitor Religious Liberty Abroad. As discussed above, the International Religious Freedom Act created three new entities intended to further religious liberty in the international arena. First, it established a new Ambassador at Large for International

194. Secretary's Statement on Religious Expression (last visited Oct. 6, 2000) <http://www.ed.gov/Speeches/08-1995/religion.html>.

195. *Id.* at 1.

196. *Id.*

197. *See id.*

198. *See id.* at 6.

199. For example, Marc Stern of the American Jewish Congress and Steven McFarland of the Christian Legal Society have been especially active members of the Coalition. The list also includes individuals closely allied with the Coalition, such as Forest Montgomery, National Association of Evangelicals; Charles Haynes, Freedom Forum; and Rabbi David Saperstein, Religious Action Center of Reform Judaism.

200. *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999). The order also applies to hate crimes involving race, ethnicity, or sexual orientation.

201. *See* Proclamation No. 7187, 64 Fed. Reg. 22,777 (1999).

Religious Freedom.[202] That position has been filled by Robert Seiple, the president of an international Christian relief organization, who was chosen in June 1999.[203] Second, it created a new U.S. Commission on International Religious Freedom in the State Department.[204] The President appointed one of the leaders of the Coalition for the Free Exercise of Religion to the position of Executive Director of the Commission, Steve McFarland of the Christian Legal Society.[205] Third, the Act introduced a Special Adviser on International Religious Freedom into the National Security Council, a position yet to be filled.[206]

5. Amendments to the American Indian Religious Freedom Act. In response to two Supreme Court decisions under the Free Exercise Clause, *Lyng v. Northwest Indian Cemetery Protective Association*[207] and *Employment Division v. Smith*,[208] the Clinton Administration supported amendments to the American Indian Religious Freedom Act that would make it easier for Native Americans to use peyote during religious ceremonies without legal consequences, and to use federal lands for religious purposes.[209]

6. National Religious Freedom Day. On December 9, 1992, President George Bush issued a presidential proclamation declaring January 16, 1993, Religious Freedom Day. The designation of such an official day was the brainchild of the Council for America's First Freedom, and the proclamation was made at the request of Congress pursuant to a joint resolution.[210] President Clinton took up where President Bush left off, declaring a national Religious Freedom Day each year by presidential proclamation.[211]

The President's rhetoric, therefore, has not been empty. A remarkable series of actions have followed from the rhetoric. The record reveals a conscious agenda to further free exercise in every corner imaginable. In addition to favoring aggressive legislation aimed at the domestic and foreign fronts, the Administration has addressed religious exercise in the federal workplace and in the

202. *See* 22 U.S.C. § 6411(b) (1994); discussion *supra* note 141 and accompanying text.

203. *See* Larry B. Stammer, *An Envoy for All Faiths: The Nations' First Ambassador for International Religious Freedom Has the Job of Pursuing Human Rights and an End to Persecution as Primary Foreign Policy Objectives*, L.A. TIMES, June 12, 1999, at B2.

204. *See* 22 U.S.C. § 6431(a) (1994); discussion *supra* note 143 and accompanying text.

205. *See Religious Freedom Panel Gets Executive Director*, Religion Around the World, DESERET NEWS, Sept. 11, 1999, at E2 .

206. *See* National Security Act of 1947, 50 U.S.C. § 402(i) (1994).

207. 485 U.S. 439 (1988).

208. 494 U.S. 872 (1990).

209. *See* S. REP. NO. 103-411, 103d Cong. (1994).

210. *See* Proclamation No. 6514, 57 Fed. Reg. 58,697 (1992); H.R.J. Res. 457, 102 Cong. (1992); Bill Broadway, *A True Believer in Tolerance; Jefferson's Virginia Statute Laid Foundation for First Amendment*, WASH. POST, Jan. 2, 1999, at B7.

211. *See* Proclamation No. 7267, 65 Fed. Reg. 2035 (2000); Proclamation No. 7162, 64 Fed. Reg. 2989 (1999); Proclamation No. 7063, 63 Fed. Reg. 3234 (1998); Proclamation No. 6696, 62 Fed. Reg. 3191 (1997); Proclamation No. 6862, 61 Fed. Reg. 1271 (1996); Proclamation No. 6646, 59 Fed. Reg. 2925 (1994); Proclamation No. 6514, 57 Fed. Reg. 58,697 (1992).

public schools, added high-level executive-branch appointments specifically geared toward religious liberty, and attempted to set a national tone favoring free exercise by declaring a National Religious Freedom Day.

IV

CONCLUSION

President Clinton's record on religious issues reveals a consuming interest with religious free exercise, a drive to increase the ecumenism of religious bodies in the political process at both the national and international levels for the purpose of empowering religion, and a desire to bring church and state closer together. President Clinton appears oblivious to Madison's warnings that all entities, including religious entities, are likely to abuse their power in the political process and that concentrations of power—either through religious ecumenism or church-state union—are potentially tyrannical.

To the contrary, President Clinton has preached in favor of political ecumenism and against the factionalization of religious entities. He has taken a tack that directly opposes the one Madison believed would inoculate the United States against religious domination and corruption of politics. As a result, his Administration has fostered an accumulation of religious power, and a union of church and state power, that threatens to undermine the Madisonian separation-of-power principle at the heart of the Constitution, which has made the Constitution such a successful weapon against tyranny.[212]

President Clinton also partakes of the faultlines in our culture on religion: frequently whitewashing religion and assuming that every American is religious in a way that contributes positively toward the culture.[213] On this reading, hate groups are not religious, and religion is remarkably benign. Of course, hate groups act out of deeply religious, even if socially unacceptable, premises, and many religions are not only not benign, but also positively dangerous. President Clinton's rhetoric, however, sidesteps this more nuanced and empirically accurate portrait of religion. Compared to Framer and President Madison, President Clinton's religion policies are simplistic and one-sided. They have lacked the subtlety of Madison's innate common sense and distrust, and therefore have threatened to tip the balance toward religion in a way that does not expand overall liberty, but rather contracts it.

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212. *See generally* Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807 (1999); *Reply*, 31 CONN. L. REV. 1001 (1999).

213. *See generally* Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619 (1998).